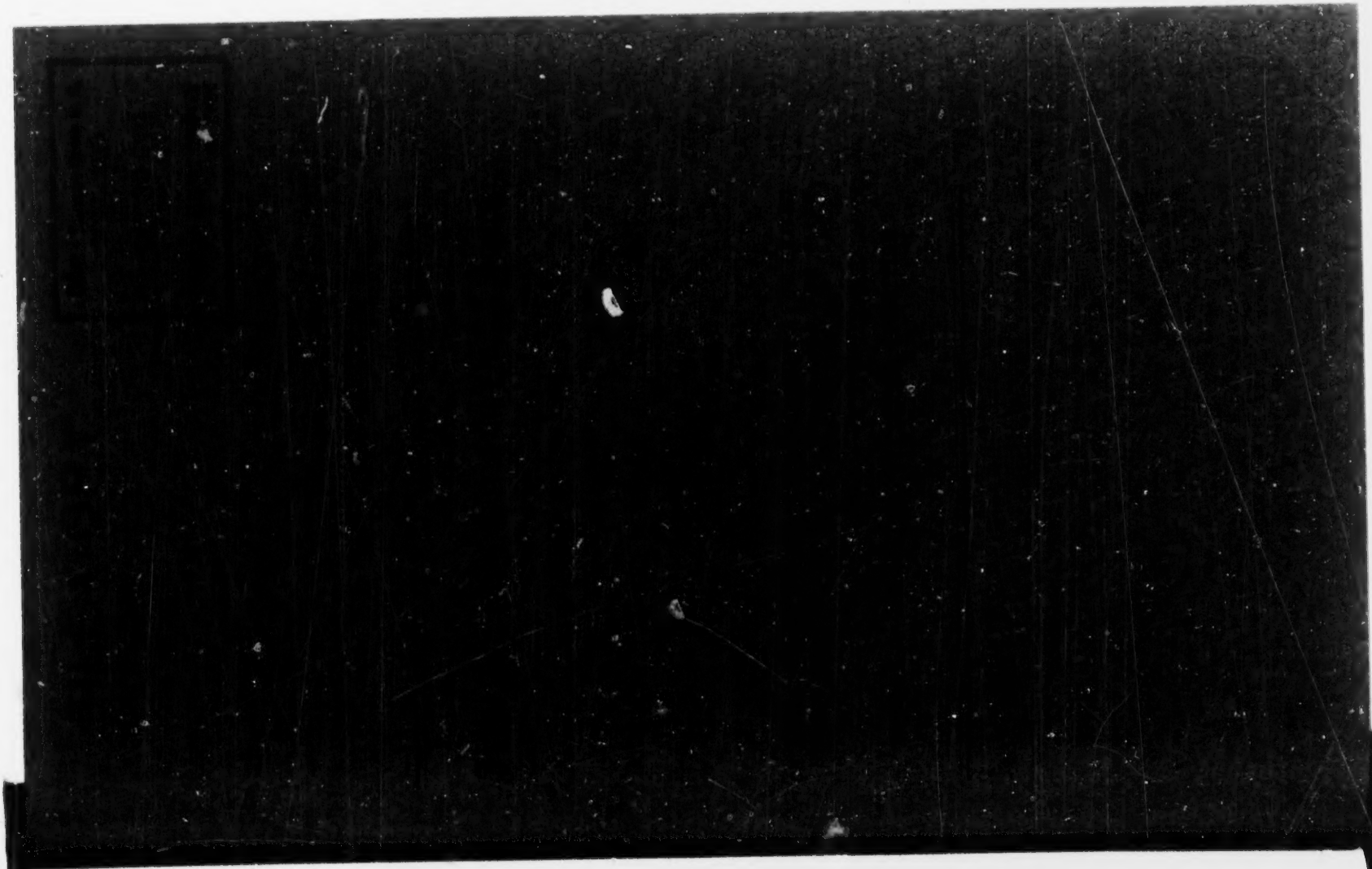

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 514

THOMAS HENRY ROBINSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 1571) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 31, 1944 (R. 1569), and a petition for rehearing (R. 1573) was denied August 28, 1944 (R. 1574). The petition for a writ of certiorari was filed September 27, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the term "liberated unharmed" in the clause of the Federal Kidnaping Act limiting the imposition of the death penalty is so vague and uncertain as to render that portion of the Act unconstitutional as applied to one who is charged with not having liberated the victim unharmed and for whom the death penalty is sought.

2. Whether the indictment is sufficient to support petitioner's conviction.

3. Whether the evidence is sufficient to establish that petitioner did not release his victim unharmed.

4. Whether it was error to admit letters written by petitioner while he was imprisoned under a prior invalid judgment.

5. Whether petitioner was accorded a fair and full trial, free from prejudicial comment by the prosecuting attorney and the trial judge.

6. Whether the jury's recommendation of the death penalty was influenced by a factor which they should not have taken into consideration.

7. Whether petitioner was prejudiced by the failure of the judge to sustain his challenges for cause to five prospective jurors.

8. Whether the alternate juror statute is constitutional, and whether petitioner was prejudiced by the use of an alternate juror.

9. Whether petitioner was subjected to double jeopardy in contravention of the Fifth Amendment to the Constitution.

STATUTES INVOLVED

The Federal Kidnaping Act of June 22, 1932, c. 271, 47 Stat. 326, as amended by the Act of May 18, 1934, c. 301, 48 Stat. 781 (18 U. S. C. 408a) provides in pertinent part as follows:

> SEC. 1. Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine: *Provided*, that the failure to release such person within seven days after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a presumption that such person has been transported in interstate or foreign commerce, but such presumption shall not be conclusive.
>
> * * * * *

The Act of June 29, 1932, c. 309, 47 Stat. 380 (28 U. S. C. 417a), provides in part as follows:

> whenever, in the opinion of a judge of a court of the United States about to try a defendant against whom has been filed any indictment, the trial is likely to be a protracted one, the court may cause an entry to that effect to be made in the minutes of the court, and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or two additional jurors, in its discretion, to be known as alternate jurors. Such jurors must be drawn from the same source, and in the same manner, and have the same qualifications as the jurors already sworn, and be subject to the same examination and challenges: * * *.

STATEMENT

On October 20, 1934, petitioner, his wife, and father were indicted (R. 1–5) in the District Court of the United States for the Western District of Kentucky in two counts, the first charging a conspiracy to violate Section 1 of the Federal Kidnaping Act (R. 1–3), in violation of Section 3 of that Act, and the second charging the substantive offense (R. 4–5). The second count alleged, in substance, that petitioner and his codefendants unlawfully transported in interstate commerce one Alice Stoll who had been kidnaped and held for ransom, and did not liberate her unharmed (R. 4). Prior to petitioner's trial, pe-

titioner's wife and father were tried and acquitted on both counts. The conspiracy count was accordingly dismissed. (R. 177.) Petitioner, then a fugitive from justice, was apprehended on May 11, 1936, at Glendale, California, returned to Louisville, Kentucky, on May 12, 1936, and arraigned the following day (R. 859, 865, 873–875, 988, 1321). Petitioner entered a plea of guilty to the kidnaping charge and was sentenced to life imprisonment (see *Robinson* v. *Johnston,* 118 F. (2d) 998 (C. C. A. 9)). In August, 1943, as a result of habeas corpus proceedings instituted by petitioner, that sentence was invalidated on the ground that he had been denied the assistance of counsel at the time he entered his plea of guilty, and he was remanded to the District Court for the Western District of Kentucky for further proceedings (50 F. Supp. 774 (N. D. Cal.).)[1]

Two attorneys were appointed for petitioner, and, upon arraignment on October 13, 1943, petitioner entered a plea of not guilty (R. 173–174, 217). The jury returned a verdict of guilty with a recommendation of the death penalty (R. 59, 1519), and the trial judge subsequently sentenced petitioner to death by electrocution (R. 66–67). Upon appeal to the United States Circuit Court

[1] The hearing in the habeas corpus proceeding followed upon this Court's remand of the cause to the Circuit Court of Appeals for the Ninth Circuit (*Robinson* v. *Johnston*, 316 U. S. 649) and that court's remand of the case to the district court for hearing (130 F. (2d) 202).

of Appeals for the Sixth Circuit the conviction was affirmed (R. 1569, 1571).

The evidence may be summarized as follows:[2]

In June 1931 petitioner obtained through C. C. Stoll and the latter's son, Berry Stoll, a position as attendant at a filling station of the Stoll Oil Refining Company in Louisville, Kentucky (R. 908–910). About six weeks later petitioner voluntarily left that position (R. 909–910, 913, 960) and thereafter he held a number of other positions in various cities (R. 913, 916–918, 920, 960–963). In about May 1934, petitioner again sought employment from C. C. Stoll, but the latter declined to rehire him, stating that it was against the policy of the company to rehire former employees who had left voluntarily and mentioning the then-existing depression (R. 918–919, 920). Shortly thereafter petitioner obtained a position as night janitor in Oak Park, Chicago, which he held for a short time (R. 920–921, 1319). This was petitioner's last employment. Upon leaving there petitioner and his wife moved to another part of Chicago, where they lived under an assumed name (R. 471–476, 477–480, 921, 966, 967).

During the first week of September 1934 petitioner, having then been without work for about a month, rented an automobile and drove with

[2] While petitioner challenges the sufficiency of the evidence only in so far as it relates to the imposition of the death penalty, a general summary of the evidence is of value in the appraisal of several of petitioner's contentions.

his wife to Indianapolis, Indiana, where they rented an apartment under the name of Thomas W. Kennedy (R. 476–483, 699–705, 921). Subsequently, on several occasions, petitioner sought employment in Indianapolis, but was unsuccessful (R. 921).

During September or October 1934, petitioner decided to kidnap C. C. Stoll (R. 922–923). While in Indianapolis, petitioner purchased a pistol (R. 984, 986) and thereafter wrote on his typewriter a ransom note which, with a few changes, was subsequently left by petitioner in the room from which he abducted Mrs. Stoll (see *infra*, p. 10) (R. 656–661, 922, 925, 961; Gov. Ex. 33, R. 598).

On October 8, 1934, petitioner and his wife drove to Louisville where, after placing his wife on a train for Nashville, he registered at a hotel under the name of John Ward (R. 488–489, 922). The next day petitioner, admittedly having "in mind the purpose of kidnaping Mr. Stoll," drove to C. C. Stoll's residence and "entered the home on some kind of pretense or other that I was a telephone man" (R. 922–923, see also R. 497–500). After learning that C. C. Stoll was not at home, petitioner entered the adjoining home of George Stoll under the same guise looking for C. C. Stoll (R. 504–511, 923). Not finding him there, petitioner returned to the hotel (R. 923).

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The following day, October 10, 1934, petitioner proceeded to the home of Berry Stoll for the admitted purpose of kidnaping him (R. 511–518, 520, 923). Petitioner gained access to the house by claiming to be a telephone repair man (R. 518–519, 601, 671–675, 923). He questioned the maid who admitted him as to who was about, and thus learned that Mrs. Berry (Alice) Stoll was at home on the second floor of the house (R. 603–604, 923). Petitioner also questioned the maid about the relationship existing between Mrs. Stoll, Berry Stoll, and the Speed (Mrs. Stoll's (R. 548)) family (R. 603). Pretending to check the telephone facilities, petitioner went about the Stoll premises, finally asking the maid whether there was a telephone extension on the second floor. Upon being informed that there was such an extension, petitioner told the maid that he wanted to inspect it and asked her to accompany him (R. 604–605, 924).[3] The maid informed Mrs. Stoll of this request and the latter, who was nursing a cold and was attired in a kimono in her bedroom, which contained the extension, moved to the guest room (R. 518–519, 550–552, 604–605, 662).[4]

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[3] Petitioner's actions did not arouse suspicion since the Stolls were having difficulties with the telephone at that time (R. 601–602).

[4] The events related to this point, as to which there is little or no conflict, are evidenced largely by petitioner's own testimony. The events hereinafter related were proved

Once in the bedroom, petitioner placed a gun against the maid's back and directed her to go to the guest room (R. 605–606). Upon petitioner's entrance behind the maid into the guest room, Mrs. Stoll, who testified that she had never seen, talked to, or known petitioner prior to this occasion (R. 588–589), asked him what he was doing there. Petitioner replied that he had come to kidnap her. (R. 520, 553, 554, 606, 612–613.) Mrs. Stoll then in various ways, including the offer of a check, sought to dissuade petitioner, but without success (R. 520–521, 554, 606, 616, 924). Petitioner next temporarily placed his gun upon the bed in order to bind Mrs. Stoll. She attempted to snatch it, whereupon petitioner struck her upon the forehead with an iron pipe which he pulled out of his pocket, causing a fracture. (R. 521, 556–557, 590–591, 606–608, 676; Gov. Ex. 34, R. 606.) Mrs. Stoll continued to resist, calling out to the maid to get a gun which was in Mrs. Stoll's bedroom and herself made moves in that direction. Petitioner again struck Mrs. Stoll on the head with the pipe, causing her to bleed profusely and to collapse, in a dazed state, upon the bed. (R. 521–522, 607, 610–611; see also R. 596–597, 633–

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by the testimony of Mrs. Stoll, the maid, and others, and by means of exhibits. In many respects this evidence coincided with the testimony of petitioner, who, however, as we show below (pp. 15–16), asserted that Mrs. Stoll was not abducted but was a willing victim with whom he was to and did share the ransom money.

634, 654, 673, 676, 680.) Petitioner, pointing his gun at Mrs. Stoll and the maid, then pulled Mrs. Stoll upright and ordered the maid to bind Mrs. Stoll's wrists with wire, which he produced from his pocket (R. 522, 555, 606–608). After Mrs. Stoll's hands had been bound, petitioner bound the maid hand and foot (R. 522, 609). While doing this petitioner threatened to kill Berry Stoll if he should arrive upon the scene; Mrs. Stoll, who had up to this point resisted petitioner "to every ounce of my strength," thereupon ended all resistance, being "anxious to get away before Berry came, I was afraid he would shoot him" (R. 522, 557, 609). Petitioner then placed adhesive tape over Mrs. Stoll's mouth (R. 523, 606–608) and, at the point of his gun (R. 522–523), ordered Mrs. Stoll out of the guest room to his car (R. 522–523, 609). As petitioner left the guest room, he threw onto the bed the ransom note (R. 609, 656–661, 678; Gov. Ex. 33, R. 598), which he had prepared in anticipation of abducting C. C. Stoll (see *supra*, p. 7), and said to the maid, whom he had left bound on the floor (R. 609, 653–654), "You give this to Berry Stoll" (R. 609, 611; see also R. 546, 555). On the note petitioner had inserted in pencil Mrs. Stoll's name as the victim, the name and address of the intermediary, and had changed the ransom demanded from $30,000 to $50,000 (R. 922–925, 932–933; see also R. 736–749, 961).

When petitioner and Mrs. Stoll reached his car, he ordered her to lie down on the floor in front

of the rear seat, bound her feet, and covered her completely with a blanket and newspapers (R. 523–524, 555, 560). After riding for at least two hours, petitioner informed Mrs. Stoll that they were in Indianapolis, Indiana (R. 525). He soon drove into a dark garage where he got out of the car, stating to Mrs. Stoll, who was still bound and gagged, that he was going to see whether "the coast was clear" and that if she made any attempt to scream or attract attention, he would "bump her off" (R. 525–526). He returned to the car in about five minutes, stated that the "coast was not clear," and drove the car to a deserted neighborhood (R. 526). There he unbound Mrs. Stoll's feet, directed her to sit next to him on the front seat (R. 526, 561), and then removed the tape from her mouth. Her head was still bleeding. At her request, he unbound her wrists, which were causing her great pain. (R. 526, 527, 561.) Mrs. Stoll, who had not seen the ransom note or the envelope in which it was contained (R. 546, 555), asked petitioner why he had kidnaped her. He replied, "For the money". (R. 527.) Petitioner then drove back to the garage where they had been previously and, upon arrival, asked Mrs. Stoll whether he would have to carry her or whether she would walk (R. 527). Mrs. Stoll agreed to walk, and they entered through the rear door of the apartment which petitioner had previously rented under the name of Kennedy (see p. 7, *supra*) (R. 527–528, 928). That night Mrs.

Stoll, who was very weak and ill, and whose head was "going around" and bleeding, asked petitioner to apply mercurochrome to the cut. He complied with this request but gave her wound no other attention. (R. 529, 563.)

Petitioner held Mrs. Stoll in this apartment from October 10 to 16, 1934 (R. 525–540, 699–705, 928–929). During that period he required her to sleep in one of the twin beds in the bedroom while he slept in the other, rejecting her request that she be permitted to sleep in the living room. Each night he tied her hands to the bedsprings and attached a cord from her wrist to his so that he would be warned of any movement by her. (R. 528, 529, 563, 704.) During the entire time, petitioner kept all the window shades drawn (R. 536, 570, 571, 576, 702, 723, 930). Several times a day, when he had occasion to leave the apartment to purchase food or for other reasons, petitioner would place a chair in the closet, securely tie Mrs. Stoll to it, gag her, place adhesive tape over her mouth, and lock the door (R. 530–531, 565, 581, 941). When Mrs. Stoll used the bathroom, she was permitted to close, but not lock, the door, and petitioner sat in the living room opposite the door holding a pistol in his hand (R. 566–567, 569, 572, 576; cf. R. 930).

During this period petitioner apparently spoke to the intermediary and others by telephone (R. 534–535, 569, 579, 581, 634, 636, 929). He soon

became angry at the delay in the payment of the ransom (R. 535), and Mrs. Stoll, at his direction and in words dictated by him (R. 533–536, 932), wrote three letters (Gov. Exs. 30–32, R. 533–537). The first of these, dated October 13, addressed to the intermediary, petitioner's father, urged the payment of the ransom as directed in the typewritten instructions which petitioner prepared and enclosed with the letter (Gov. Ex. 31, R. 535–536; Gov. Ex. 80, R. 985–986). Mrs. Stoll's wedding ring also was enclosed, for purposes of identification (R. 535). In his accompanying typewritten instructions, petitioner stated, in part, "I am the kidnaper of Alice Stoll. She is alive * * * and only has a small cut on her head * * *," that unless the ransom was paid as directed, Mrs. Stoll would "never be seen alive," and that any attempt to follow the bearer of the ransom funds "will mean death to Mrs. Stoll" (Gov. Ex. 80, R. 985–986). The second letter, dated October 14, was sent to a friend of Mrs. Stoll, a Miss McHenry, and, confirming a telephone call made to her by petitioner upon Mrs. Stoll's suggestion after he had refused to telephone to her family (R. 532), reiterated petitioner's instructions as to the manner of delivery of the ransom money and urged the necessity of strict compliance with the instructions, stating also in part that unless the instructions were followed and the police were

called off, the kidnaper and a friend of his "will carry out their threat" (Gov. Ex. 30, R. 533–534).[5] On October 14, Mrs. Stoll, at petitioner's direction wrote to her husband stating that the kidnaper knew that the intermediary was being watched by the police and indicating that unless the instructions formerly given were followed her life would be in danger (Gov. Ex. 32, R. 536–537).

Fifty thousand dollars in bills of denominations prescribed in the ransom note was obtained by the Stoll and Speed families and, in accordance with petitioner's instructions, was transmitted to the intermediary and, eventually, on October 16, 1934, was delivered to petitioner by his wife at the apartment in Indianapolis (R. 538–539, 582, 639–653, 665, 668–694, 809–811, 938, 972). After he had thus received the money, petitioner, having unsuccessfully sought to persuade his wife (who had warned him that the police were following her) to flee with him (R. 538–539), again bound Mrs. Stoll to a chair and locked her in the closet, threatening to kill her if she made any attempt to leave the apartment within less than 24 hours (R. 539–540). Petitioner left but returned in about a half hour and again sought to persuade his wife to leave with him; she refused and he finally departed alone (R. 540–541).

[5] Petitioner had led Mrs. Stoll to believe that he had two confederates (R. 538).

Mrs. Stoll was released by petitioner's wife shortly thereafter, on October 16, and returned home later that day (R. 540–541, 545–546, 574, 584–586, 662). At the time of her return, Mrs. Stoll still had on her head the cut, which was surrounded by clotted blood, and also a rounded swelling about an inch and a half in diameter which was of such a character as to indicate a possibility that "the actual integrity of the bone had been interrupted." Her lips were raw and bleeding as a result of the application of adhesive tape and she was in a state of general nervous tension and exhaustion (R. 590–592, 662, 636–637, 1043; see also Gov. Ex. 80, R. 985–986).

At the trial petitioner himself related almost all of the events which preceded his entry into the guest room on October 10, 1934 (R. 880–924, 961), and admitted his transportation of Mrs. Stoll from Louisville to Indianapolis (R. 926–927), their seven-day stay there, his preparation of the typewritten instructions, signed "kidnapper," which he mailed with Mrs. Stoll's letter of October 13 (see p. 13, *supra*) (R. 984–986), and his receipt of the ransom money (R. 937–938, 972). However, contrary to evidence previously and subsequently adduced by the Government (R. 552, 588–589, 616, 731–733, 1090–1091, 1348, 1351–1354, 1356–1360, 1363–1364, 1418), petitioner testified that he had sexual intercourse with Mrs. Stoll in 1931 on various occasions (R. 910–913);

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that he had no gun on his person when he entered the Stoll house on October 10, 1934 (R. 929); that he did not strike or injure Mrs. Stoll at that time (R. 993–994); that on October 10, when he entered her room, Mrs. Stoll recognized him and voluntarily offered to become the substitute for her husband, Berry Stoll, whom petitioner had come to kidnap; that she suggested that petitioner raise the ransom sum demanded to $50,000, and offered to assist him in obtaining the ransom if he would share it with her; that she voluntarily left the premises and accompanied him in his car to Indianapolis and remained there voluntarily for the first four or five days of their stay; and that he gave her one-half of the ransom money (R. 924–933, 937, 941–942, 972–977).

Petitioner also offered evidence (R. 40–41, 45, 883–922, 949–972, 992–993, 1070–1121, 1129, 1289–1312), including the testimony of psychiatrists (R. 1139–1140, 1197, 1218–1219), in support of his defense that he was insane at the time of the kidnaping on October 10, 1934 (R. 12). Prior to the acceptance of a plea from petitioner in the present proceeding the court, upon motion of the Government (R. 12–13), appointed four psychiatrists to examine petitioner and render a report as to his sanity as of that time (R. 34); these psychiatrists reported that petitioner was as he conceded (R. 12, 27–28, 37, 176–177, 948), then sane (R. 37–38, 106–107, 942, 1388–1389,

1390, 1401–1402, 1412). In addition, there was adduced at the trial professional testimony and other evidence tending to show that during a substantial period of time both preceding and following October 10, 1934, petitioner was normal, was capable of distinguishing right from wrong, and fully realized the consequences of his deliberate acts (R. 472–474, 478–480, 485–487, 501, 579–580, 750–751, 779–782, 791–794, 963–965, 1090–1092, 1292, 1295–1297, 1314–1316, 1319–1320, 1326–1333, 1338–1340, 1373–1387, 1387–1389, 1397, 1402, 1408, 1409, 1411).

ARGUMENT

1. Applying it to the case of a kidnaper who is charged with not having liberated his victim unharmed and for whom the Government invokes the death penalty, one of petitioner's contentions is that the term "liberated unharmed" in Section 1 of the Federal Kidnaping Act (*supra*, p. 3) is too vague and uncertain to meet the standard of due process. He says that the words do not disclose whether they cover any injury during the period of the victim's captivity or whether they relate only to his condition at the time of his release and that, further, they do not indicate the character and degree of the injury to which they relate. (Pet. 69–75.) The circuit court of appeals held that the provisions in which the term is found involve merely the punishment and there is

nothing in the Constitution which grants the accused the right to be informed of the punishment that may be inflicted upon him by law (R. 1571, op. 3).[6] But it further held, in passing upon the sufficiency of the indictment, that "there is no merit in the contention that the language 'liberated unharmed' is too indefinite and uncertain," and that if ambiguity should be assumed it was completely negatived by the averments that Mrs. Stoll was beaten and bruised and injured (R. 1571, op. 4–5). While it is true, as the circuit court of appeals states, that the question whether the victim was liberated unharmed does not relate technically to an element of the offense since, as the court points out (R. 1571, op. 4), the kidnaper may be convicted regardless of whether the victim is liberated at all or, if the victim is liberated, regardless of the victim's condition, mental or physical, we think that due process requires that the measure of punishment be sufficiently definite as to be understandable to those entrusted with the meting out of the punishment. Where the victim is liberated prior to the prosecution, the court cannot ~~seek~~ impose a death sentence until it has the verdict of the jury recommending such a penalty and the jury is not entitled to return such a verdict where the victim was liberated

[6] R. 1571 embraces the whole opinion; we have consequently referred to the individual page numbers of the printed pamphlet opinion.

unharmed. Cf. *Seadlund* v. *United States*, 97 F. (2d) 742 (C. C. A. 7). Hence, it is necessary that the question whether the victim was liberated unharmed be submitted to the jury under instructions which appropriately define that term. The trial judge cannot, of course, perform this function if the statutory words used in measuring the punishment are too ambiguous as applied to the case before him. We do not think that that can be said in the present case. One of petitioner's specifications of ambiguity was sufficiently answered in the opinions of the district court (19 F. Supp. 450, 456 (D. N. J.)) and of the circuit court of appeals (103 F. (2d) 857, 861 (C. C. A. 3)) in *United States* v. *Parker*, in which this Court denied certiorari (307 U. S. 642). In that case the circuit court of appeals said (p. 861):

> We agree with the court below that the act, reasonably interpreted in the light of its purpose, refers to the condition of the kidnapped person at the time of his release. It bans the death penalty if the kidnappers release him sound and unharmed even though he may have received injuries during his captivity from which he has recovered. Any other construction would, it seems to us, tend to encourage the murder of the victim by the kidnappers if in the course of the kidnapping he had been injured. Congress must have preferred, as the court below aptly said (19 F. Supp. 450, 456), "a cured and live victim to a dead or per-

> manently injured one, even if the kidnappers must refrain from liberating until the cure is accomplished."

Nor is there any merit in the contention that the term "liberated unharmed" is too uncertain as to the character and degree of the injury contemplated. "Harm" is a word in common usage with a well-defined meaning of "hurt" or "injury". See Webster's, *New International Dictionary*. Whatever may be the full ambit of these words, they apply to a situation, like the present, where the evidence discloses that the victim was twice brutally beaten over the head with an iron pipe while she was in the custody of the kidnaper, that she was still suffering from these injuries when, six days later, she was released, and that, in addition, her lips were raw and bleeding as a result of the adhesive tape which had been applied to them, and she was in a state of nervous exhaustion and tension. Certainly petitioner cannot complain because in some other situation there may be a question as to whether some other type of injury amounts to harm. Cf. *United States* v. *Classic,* 313 U. S. 299, 324–325. Here the term was properly defined by the trial judge, in a charge to which there were no exceptions, in submitting to the jury for their determination the issue as to whether they should recommend the death penalty (R. 1516–1518), and the evidence amply supports the verdict that petitioner's victim was not liberated unharmed.

2. Petitioner asserts (Pet. 76–88) that the indictment is defective because (1) it fails to particularize sufficiently the allegation that Mrs. Stoll was not liberated unharmed, (2) it is duplicitous and alleges a "constructive offense" by including charges of assault and battery in addition to that of transportation of a kidnaped person in interstate commerce (Pet. 82–86), and (3) it is insufficient as to the time and place of the commission of the crime charged (Pet. 87). These assertions are clearly without merit. The indictment (R. 4) alleged that on or about October 10, 1934, Mrs. Stoll was transported in interstate commerce after having been unlawfully seized, kidnaped, abducted and carried away and held for ransom, from Louisville, Kentucky to Indianapolis, Indiana and, while in the custody of the alleged kidnapers, was beaten, injured, bruised and harmed and was not liberated unharmed.

There is a manifest inconsistency in petitioner's argument that the indictment is insufficient for failure to set forth the facts as to the harm done to Mrs. Stoll and his argument that the indictment is duplicitous because it specifies that she was beaten and bruised. The recital of these facts did not, of course, charge petitioner with any additional federal offense; they were inserted to advise petitioner that the case was one in which the death penalty was applicable and would be invoked. The indictment clearly put

petitioner on notice that he was charged with not having liberated Mrs. Stoll unharmed, and went further by specifying the manner in which she was injured. Had petitioner desired fuller details as to the extent of the injuries which the Government would attempt to prove his remedy was by motion for a bill of particulars. Cf. *Glasser* v. *United States,* 315 U. S. 60, 66. The time and place of the offense are clearly specified with sufficient certainty. *Glasser* v. *United States, supra; Hudspeth* v. *McDonald,* 120 F. (2d) 962, 965 (C. C. A. 10), certiorari denied, 314 U. S. 617.

3. Petitioner contends (Pet. 89–90) that he was entitled to a directed verdict, or at least to a direction to the jury that they were not entitled to recommend the death penalty, on the ground that the indictment alleges that the injuries upon Mrs. Stoll were inflicted by petitioner, his father and wife while in their custody, and the Government's proof shows that the injuries were inflicted prior to Mrs. Stoll's being taken into custody and prior to her transportation in interstate commerce, and fails to show that she was ever in the custody of anyone except petitioner or that the injuries which Mrs. Stoll had upon her release were those inflicted by petitioner. The first injuries inflicted by petitioner upon Mrs. Stoll occurred in the course of his seizing and kidnaping her and hence were inflicted at the commence-

ment of the interstate journey. Obviously Mrs. Stoll, confronted by an armed kidnaper, was in custody from the moment he entered her room until she was released six days later. See *Gooch* v. *United States,* 82 F. (2d) 534, 538 (C. C. A. 10), certiorari denied, 298 U. S. 658. Nothing in the statute limits the application of the death penalty to abductions in which injuries are inflicted upon the victim subsequent to the transportation in interstate commerce. Moreover, petitioner's injuries to Mrs. Stoll's face by his application and removal of adhesive tape while at his apartment were still present at the time of her release.

Petitioner's contention that it was necessary to prove that Mrs. Stoll was injured while she was in the custody of all three persons indicted is baseless. The mere fact that petitioner's two codefendants were acquitted of complicity in the kidnaping cannot, of course, absolve petitioner from the consequences of his own acts, which were both charged and proved.

With reference to the identity of the person who inflicted the head injuries from which Mrs. Stoll was suffering at the time of her release, it is clear from the testimony of both Mrs. Stoll and the maid that it was petitioner (*supra,* p. 9). Mrs. Stoll also testified that her head was bleeding when they reached Indianapolis (*supra,* p. 12), that petitioner treated the head wound with

mercurochrome when they reached his apartment (*supra*, p. 12), that when she was released by petitioner, her "head was still thickly clotted with blood" and that she had "raw sores" on her lips from the adhesive tape that had been "put on and off so much" by petitioner (R. 545). In addition to Mrs. Stoll's testimony that she was bound and her mouth taped by petitioner several times daily (*supra*, p. 12), petitioner admitted in effect that he bound Mrs. Stoll during at least part of the time they were in his apartment (R. 928–929). Finally, there is testimony (*supra*, p. 15) as to Mrs. Stoll's physical state on October 16 when she returned home. There is no testimony that any injuries whatsoever were inflicted upon Mrs. Stoll by anyone other than petitioner. Upon such direct and circumstantial evidence, the jury was entitled to conclude, as it did, that petitioner inflicted the injuries which Mrs. Stoll had at the time of release.

4. Petitioner asserts (Pet. 63–68) that the trial court improperly admitted in evidence two letters, one to W. A. Smith of the Federal Bureau of Investigation (Gov. Ex. 51; R. 990–991), and another to Sanford Bates, Director of the Federal Bureau of Prisons (Gov. Ex. 79; R. 958–960), which he wrote in 1936 while he was imprisoned at Leavenworth Penitentiary following his original plea of guilty to the indictment in this case. Petitioner claims that these letters are in the

nature of admissions and confessions, and that they were involuntary because petitioner had been "induced to write them under the hope, promise, inducement and persuasion" of the prison warden that petitioner, by writing these letters, would be taken from isolation; and that he had also been advised by the prison psychiatrist that so long as he claimed to be insane he would be ineligible for parole (Pet. 63).

The Smith letter, in which petitioner requested the transfer to his mother of all his available personal effects, contains, it is true, an admission that petitioner utilized money which had been exchanged for ransom money for the purchase of an automobile. But this added nothing to petitioner's prior testimony that he had collected a ransom and had given half of it to Mrs. Stoll (*supra,* p. 16). Only that portion of the letter which contained no reference to the ransom money was at first admitted for the sole purpose of obtaining a specimen of petitioner's handwriting, in order to support the Government's contention that petitioner wrote the ransom notes and other documents (R. 755–758). The entire letter was read to the jury upon cross-examination of petitioner (R. 990–991) only after he had admitted on direct that he had received the ransom money. While petitioner objected to the introduction of the entire letter when it was first offered, he withdrew his objection when the unobjectionable portion

was offered for the limited purpose of establishing petitioner's handwriting (R. 755–758); when the letter was later offered in full (R. 990–991), petitioner did not object.

Petitioner objected to the introduction of the Bates letter (R. 955) on the ground that it was an admission or confession and was inadmissible because he was under an adjudication of insanity which had not been lifted and because inducements had been held out to him by the prison warden and psychiatrist (R. 955–958). The letter did not purport to be a confession or admission in the ordinary sense of those terms. It was written (R. 958–960) apparently for the three-fold purpose of inducing Mr. Bates to allow petitioner to remain at Leavenworth, which was near his home, instead of being sent to Alcatraz; to convince Mr. Bates that petitioner was not a mental case, the former decree of insanity having been obtained as "the result of my father imposing on his friendships," in order that Mr. Bates would see that petitioner obtained some constructive employment in the prison; and to persuade Mr. Bates to allow a certain girl, with whom petitioner was in love, to visit him and to correspond with him. It will be noted that there is in the letter itself no reference to any isolation of petitioner or to parole. Only in his avowals that he had found that crime did not pay and that he had determined to take his "sentence like a man" is there to be found any

implication that petitioner admitted his guilt, and they were evidently inserted in the letter solely to persuade Mr. Bates that petitioner had learned his lesson and that his requests deserved consideration. Moreover, the letter was admitted only on the issue of petitioner's sanity and the jury was instructed that it was not to be considered for any other purpose (R. 958). Petitioner's attack in this Court is predicated not on the ground that the letter was a confession of guilt but rather that it was a disavowal of insanity. He contends that it was not admissible unless attended by the same safeguards as apply to confessions since it was designed to negative his defense of insanity. (Pet. 65–67.) Perhaps one's appraisal of his own sanity is of no value one way or the other; that must be determined by other factors, such as conduct, expressed thoughts, etc. But this letter was of some value on the issue of sanity. It disclosed a quite rational discussion of the matters with which it dealt and bore all the earmarks of a letter of a sane man. We think, therefore, it was properly submitted to the jury as part of the non-psychiatric evidence before it upon the issue of sanity. It was, however, only a minor factor in comparison with the mass of expert and non-professional testimony which dealt specifically with that issue. The letter itself is quite inconsistent with the claim that it was coerced or induced, and the evidence dehors the letter does not, we believe,

support a picture of coercion (cf. R. 956–957). The circuit court of appeals found that both it and the Smith letter "were written without the slightest duress or constraint" and "were wholly voluntary" (R. 1571, op. 21–22).

5. Petitioner contends (Pet. 45–54) that remarks made by the prosecuting attorney during his summation and the comments upon the testimony by the trial court in his charge so destroyed the fairness of his trial as to require reversal of his conviction. It should be noted that petitioner did not at the trial offer any objection or exception in this respect. Hence, unless the alleged misconduct is so devitalizing in character as to fall within the doctrine that this Court should, in the interests of justice, consider the alleged error even though not excepted to in the trial court (*United States* v. *Atkinson,* 297 U. S. 157, 160), petitioner is precluded from seeking review on such ground. *United States* v. *Socony-Vacuum Oil Company,* 310 U. S. 150, 239; *Crumpton* v. *United States,* 138 U. S. 361, 364; *Petrilli* v. *United States,* 129 F. (2d) 101, 104 (C. C. A. 8), certiorari denied, 317 U. S. 657.

The remarks by the prosecuting attorney to which petitioner objects (Pet. 47–48) relate to statements made by the former with reference to the embarrassment to him and Mrs. Stoll which existed when he felt compelled to advise her of the probability that petitioner would give testi-

mony that would reflect upon her virtue, statements concerning the difficulties which the prosecuting attorney encountered in procuring witnesses to refute testimony of this character (R. 1497–1499), and a reference to the dangers with which the mothers and fathers of young women would be faced, based on petitioner's past performances, if petitioner, who was then concededly sane, were freed by the jury's verdict (R. 1494). The circuit court of appeals' opinion dealt with the first two of the alleged objectionable statements and held that they overstepped the bounds of propriety, but that, when they were examined in connection with the entire argument, they were "isolated expressions, which could have no prejudicial effect" (R. 1571, op. 22). We think the circuit court of appeals was correct in its appraisal, and that the third statement, of which petitioner apparently now complains for the first time, falls within the same category. Aside from the question of petitioner's sanity at the time of the abduction, there was really only one contested issue as to petitioner's guilt and that was whether Mrs. Stoll voluntarily accompanied petitioner from Louisville to Indianapolis. None of the prosecutor's statements bore directly upon that issue and hence there is not involved any misstatement of the evidence in respect thereof. Since petitioner's story that he had been intimate with his victim on several occasions in 1931 was so

thoroughly discredited by the Government's evidence disclosing that the tourist camp at which some of these intimacies were claimed to have occurred did not come into existence until several months after these alleged intimacies (cf. R. 908–910, 912–913 with R. 1347, 1353, 1357–1360, 1362–1364), it is evident that petitioner was making a vicious and unwarranted attack upon the virtue of his victim, a married woman. The embarrassment to Mrs. Stoll which resulted from the necessity of meeting such an attack was readily apparent to the jury which had heard the evidence. It cannot be said, therefore, that the prosecutor's remarks, both as to Mrs. Stoll's embarrassment and as to his anxiety to obtain witnesses to refute petitioner's charge, were any more harmful to the petitioner than the collapse of his unwarranted attack upon Mrs. Stoll's character. The third remark of which petitioner complains was merely an incidental comment of the prosecutor in the course of his discussion of petitioner's consistent conduct, as shown by the evidence, of attempting to evade responsibility upon charges preferred by women by casting aspersions upon their character (see R. 1493–1495). When these isolated statements are considered in the light of the prosecutor's argument as a whole and are judged in relation to the clear and convincing evidence of petitioner's guilt, we do not believe that they can be considered reversible error. *United States* v. *Socony-Vacuum Oil Company,*

310 U. S. 150, 239–240; *Dunlop* v. *United States*, 165 U. S. 486, 498.

There is no merit in petitioner's complaint (Pet. 46–47, 52–54) in respect of the comments upon the testimony by the trial judge in his charge. There is, of course, nothing in the record to indicate the tone of voice and manner of delivery of the charge by the court, but the prosecuting attorney's brief before the court below denied petitioner's assertions that they showed hostility. While petitioner makes a sweeping denunciation of the trial judge's comments upon the testimony, especially in so far as those comments bore upon that of his own witnesses, petitioner specifically attacks (Pet. 52–53) but four comments in an eighteen-page charge (R. 1499–1518). The first is the trial judge's remark that in his opinion the evidence was overwhelmingly in favor of the Government's contention that the transportation of Mrs. Stoll to Indianapolis was unlawful and against her will (R. 1509). The judge immediately followed this with the statement: "However, as I have said previously, any such opinion on my part is not in any way binding upon you, and you are the sole and exclusive judge of the facts in this case, including this particular issue." (R. 1509). Preceding his review of the evidence the judge had given specific, detailed and unequivocal instructions that the jury was entitled to disregard any state-

ment of fact and any opinion or comment by the court and that they were the sole and exclusive judges of the facts and of the credibility of each witness (R. 1505–1506). Under these circumstances, the trial judge's expression of opinion cannot be said to have coerced the jury and does not constitute error. *United States* v. *Murdock,* 290 U. S. 389, 394; *Quercia* v. *United States,* 289 U. S. 466, 469; *Patton* v. *United States,* 281 U. S. 276, 288; *Horning* v. *District of Columbia,* 254 U. S. 135; *Allis* v. *United States,* 155 U. S. 117, 123; *Simmons* v. *United States,* 142 U. S. 148, 155; *United States* v. *Parker,* 103 F. (2d) 857, 862 (C. C. A. 3), certiorari denied, 307 U. S. 642; *Russell* v. *United States,* 12 F. (2d) 683 (C. C. A. 6), certiorari denied, 273 U. S. 708. The judge's statement (R. 1514) that there did not appear to exist in Kentucky any such Lunacy Commission as that of which Drs. Solomon and Crice (psychiatrists who testified for petitioner) had claimed to be members (R. 1146–1148) but that the Kentucky statutes provided for specific appointment of physicians in individual cases where the question of sanity was in issue, was presumably accurate since it was unchallenged, although the question had arisen on the previous day and petitioner's counsel had had the same opportunity as the trial judge to examine the Kentucky statutes. There was no disparagement at all of the testimony of these witnesses with reference to petitioner's mental

condition. What petitioner refers to as the "unwarranted comment on whether petitioner's actions amounted to those of an insane person" (Pet. 53) is not clear since he does not designate any specific comment. One of petitioner's defenses was that he was insane at the time of the abduction. The court devoted seven pages of its charge to that issue, and thoroughly and comprehensively instructed the jury as to the applicable law which should guide them in their determination of the question (R. 1509–1516). He properly told the jury, of course, that they should consider not only the medical testimony but also all the acts of the defendant within a reasonable time before and after the date of the alleged offense which had a bearing on the issue, and he refreshed their recollection as to the acts which they were entitled to consider (R. 1515). We fail to see any basis for attack upon the fairness of the trial judge's summary of those acts pro and con. Finally, petitioner's assertion that the trial court made "unfair comment upon the credibility of witness Kirtley" (Pet. 53), is wholly without support since the court expressed no opinion at all concerning Kirtley's credibility, but merely restated the substance of Kirtley's testimony, and pointed out that his credibility had been attacked on several grounds, including the fact that he had been previously convicted of a felony, a factor which was "something for the jury to consider in determining what credibility you will give to

that witness' testimony" (R. 1507–1508; cf. R. 1466). We submit that the charge of the trial court was, as the circuit court of appeals found, "fair and impartial" (R. 1571, op. 23).

6. In his remarks prior to the imposition of the death sentence the trial judge stated (R. 1547):

> I have tried to consider the manner [*sic*] of the statute as to what it means, as to what controls. It seems to me that this jury would never have recommended the death penalty in this case except for the effect which they gave to the defense that the defendant made representing the relations between him and Mrs. Stoll. I believe if that contention had not been made, this jury would never have recommended the death penalty. That is only my view, but from my experience and from my own thought in the matter, I doubt very much, even if they had made such a recommendation, the Court would have considered it, except for the testimony on the part of the defendant, which I am accepting as untrue as the jury so found it and, as I have stated, at the time I thought the government's evidence overwhelmingly supported their contention in the matter.

Petitioner contends that it is therefore evident that the jury gave consideration to a factor which should not have entered into their deliberations as to whether to recommend the death penalty (Pet. 54–61). Obviously, as the circuit court of appeals concluded, there is nothing in the record which

supports any such assumption (R. 1571, op. 18–19), and we do not know what considerations actually motivated the jury in recommending the death penalty. Indeed, the jury might have been actuated by the brutality of petitioner's assaults upon Mrs. Stoll at the time of the kidnaping and the absence of any mitigating circumstances in connection with the offense. Since the evidence showed that Mrs. Stoll was not liberated unharmed, and the jury was properly instructed as to what they might consider in determining whether they should recommend the death penalty (R. 1517), and there was no demonstrable extraneous influence before the jury (cf. *United States* v. *Dressler*, 112 F. (2d) 972 (C. C. A. 7)), the jury's discretion was, it would seem clear, untrammeled and the basis of their recommendation may not be made the subject of speculation. Certainly, if the jury had attempted to impeach their verdict by advancing the ground that some extraneous consideration had motivated their recommendation, that would not have been allowed, as the court below stated, citing *Hyde* v. *United States*, 255 U. S. 347, 384, and *McDonald* v. *Pless*, 238 U. S. 264, 267. (R. 1571, op. 19). The testimony as to the alleged intimacies was offered by petitioner, and he cannot now, of course, be heard to complain that such testimony and its contradiction by the Government constituted "unwholesome * * * extraneous influences" upon either the jury or the trial court.

But even if it be assumed that the jury as well as the judge would not have concurred in the death sentence but for the failure of petitioner to establish his claim that Mrs. Stoll had been intimate with him, we do not think that that would vitiate the jury's recommendation or the judge's sentence. To give credence to his claim that Mrs. Stoll accompanied him willingly and was part and parcel of the conspiracy to mulct her husband, petitioner told the court and jury that Mrs. Stoll previously had been intimate with him on several occasions. That this was an utter fabrication was, happily, demonstrated as conclusively as the falsity of any such attack upon a woman's character can be. Petitioner therefore stood before the court and jury not as a repentant offender but as one who had not hesitated, to serve his purposes, to resort to a vicious and unwarranted attack upon the virtue of his victim, a respectable married woman. Certainly this was a factor which, in a case in which the evidence had established that the victim was not liberated unharmed, both the court and the jury were entitled to consider in determining whether there were any mitigating circumstances which would justify a recommendation of the imposition of a sentence less than death.

Petitioner is without standing to complain of the admission of evidence as to his prior convictions, or to the cross-examination of him with reference to his threats to "smear" women other

than Mrs. Stoll who had complained to the authorities about him (Pet. 61–62). Much of the evidence as to prior convictions and charges against petitioner was placed upon the record by petitioner (R. 886–887, 893–903, 991–993, 1077–1078, 1088–1089, 1111–1112, 1120) as well as by the Government, and the Government's evidence and the cross-examination with reference to these matters (cf. R. 950–954, 969–970) was relevant in connection with petitioner's defense of insanity (R. 950, 953–954). *Arwood* v. *United States*, 134 F. (2d) 1007, 1012 (C. C. A. 6), certiorari denied, 319 U. S. 776. Petitioner did not object at the trial, as he does now, to the Government's questioning of him and others as to whether he had ever stated to various officials that he would "smear" female witnesses if they testified against him on other charges (R. 971, 1089–1090). Such testimony, we submit, was clearly pertinent to the issue of petitioner's credibility in connection with his claim, denied by Mrs. Stoll, that he was intimately acquainted with her prior to the abduction. Having taken the stand in his own behalf petitioner was of course subject to the same searching cross-examination as any other witness. *Raffel* v. *United States*, 271 U. S. 494.

7. Petitioner also objects (Pet. 91–92) to the failure of the trial judge to disqualify for cause five prospective jurors as to whom petitioner subsequently exercised five of his peremptory challenges. Although petitioner asserts that these five

unidentified persons, who, we assume, are the same five concerning whom he complained in the court below (R. 1571, op. 6), should have been disqualified for cause because of various kinds of contact between them and Mrs. Stoll or her relatives, he does not contend that any of the persons who were actually on the jury were unqualified for service on any ground. Without detailing the evidence as to the challenged jurors (R. 245–315), we submit that the trial court did not abuse its discretion in denying petitioner's challenges for cause. *Reynolds* v. *United States,* 98 U. S. 145; *Hopt.* v. *Utah,* 120 U. S. 430; *Texas & Pacific Railway Co.* v. *Hill,* 237 U. S. 208; *Remus* v. *United States,* 291 Fed. 501 (C. C. A. 6), certiorari denied, 263 U. S. 717; *Belvin* v. *United States,* 12 F. (2d) 548 (C. C. A. 4), certiorari denied, 273 U. S. 706; *Lias* v. *United States,* 51 F. (2d) 215 (C. C. A. 4), affirmed, 284 U. S. 584; *Arnold* v. *United States,* 7 F. (2d) 867 (C. C. A. 7).

8. Petitioner challenges (Pet. 91–92) the constitutionality of the Act of June 29, 1932, c. 309, 47 Stat. 380 (28 U. S. C. 417a) which provides for the selection and use of alternate jurors. In addition to a regular panel of twelve jurors, an alternate juror was selected, and during the trial he replaced a regular juror who had become ill (R. 48, 408, 430–431, 1054). The alternate juror statute has been in effect since 1932 and its consti-

tutionality appears never before to have been challenged in the federal courts. We submit that it is clearly constitutional. The statute preserves the essential attributes of trial by jury, and does not impair the guarantees of the Constitution in that respect. At all times the jury in this case was composed of twelve sworn persons, who heard the evidence and received the court's instructions as to the law. A number of state decisions have upheld the constitutionality of analogous state alternate juror statutes. See *People* v. *Peete,* 54 Cal. App. 333 (1921); *People* v. *Howard,* 211 Cal. 322 (1930); *People* v. *Mitchell,* 266 N. Y. 15 (1934); *State* v. *Dalton,* 206 N. C. 507 (1934); *State* v. *Dolbow* 117 N. J. L. 560 (1937), appeal dismissed, 301 U. S. 669; *Commonwealth* v. *Fugmann,* 330 Pa. 4 (1938). At the time of selection of the alternate juror, petitioner originally objected to a "separate alternate," but withdrew his objection when the trial judge stated that he would not proceed with one alternate if petitioner objected (R. 431). Petitioner made no objection when the alternate replaced the juror who became ill (R. 1054). Having thus indicated that he was willing to proceed with one alternate and to have such alternate replace the ill juror, petitioner effectively waived any right that he might have had to the original jury of twelve without an alternate. Since petitioner could have waived a trial by jury (*Adams* v. *U. S. ex rel McCann*),

317 U. S. 269) or could have agreed to a trial by eleven jurors (*Patton* v. *United States*, 281 U. S. 276), he could, of course, agree to a trial by a jury in which an alternate replaced a regular juror.

9. There is no merit in petitioner's contention (Pet. 92–93) that he has been placed in double jeopardy in violation of the Fifth Amendment to the Constitution. Petitioner's original conviction was set aside as invalid as the result of the habeas corpus proceeding which he instituted. It is established that where a defendant himself causes his conviction to be set aside, he waives his constitutional protection against being twice put in jeopardy, and may be tried anew thereafter for the same offense. *Hill* v. *Texas*, 316 U. S. 400; *Stroud* v. *United States*, 251 U. S. 15, 18; *Trono* v. *United States*, 199 U. S. 521, 533; *Kepner* v. *United States*, 195 U. S. 100; *Murphy* v. *Massachusetts*, 177 U. S. 155, 158–160; *Robertson* v. *Baldwin*, 165 U. S. 275, 282; *United States* v. *Ball*, 163 U. S. 662, 671–672; *Pratt* v. *United States*, 102 F. (2d) 275, 279–280 (App. D. C.); *King* v. *United States*, 98 F. (2d) 291, 295 (App. D. C.); *Bryant* v. *United States*, 214 Fed. 51, 53 (C. C. A. 8).

CONCLUSION

Petitioner had a fair trial, was properly convicted, and presents no question requiring review on certiorari. On the first trial, it is true, he was given a life sentence, whereas in the instant pro-

ceeding he was given the death penalty, but it should be noted that in the prior proceeding he pleaded guilty, and there had not then been revealed the considerations which later made it apparent to the court and the jury that they had before them the case of an offender who, although he had committed a brutal crime, was quite unrepentant and did not adduce anything in mitigation of his crime. We respectfully submit that the petition for a writ of certiorari should be denied.

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